BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH S. SCHORTMANN	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,348
UNC LEAR SIEGLER	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INS. CO. NY	)	
c/o CRAWFORD & COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 15, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on May 3, 2000.

APPEARANCES

Stanley E. Oyler of Topeka, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a back injury that resulted from a series of accidents through April 29, 1997. The parties stipulated that claimant's back injury arose out of and in the course of employment with respondent. Averaging a 73 percent task loss with a 29.5 percent wage loss, Judge Benedict determined that claimant had a 51.25 percent permanent partial general disability.

Respondent and its insurance carrier contend Judge Benedict erred. They argue that the Judge ventured outside the evidentiary record by using his personal experience in the military in finding that claimant had a 73 percent task loss. In their brief and in their oral argument to the Appeals Board, respondent and its insurance carrier request the case be remanded for the Judge to decide the issues based upon the evidentiary record.

Conversely, claimant contends the Award should either be affirmed or the task loss increased to 87 percent, which is the loss testified to by both Doctors Delgado and Fahey when they considered the task list prepared by vocational rehabilitation expert Monty Longacre.

The only issue before the Appeals Board on this appeal is the percentage of task loss to be used in computing the permanent partial general disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On April 29, 1997, claimant injured his back while working for respondent. The parties stipulated that the accidental injury arose out of and in the course of employment.

2. As a result of the accident, claimant has a L4-5 herniated disc and L5 radiculopathy. The parties agree that as a result of the accident, claimant sustained a 10 percent whole body functional impairment rating. That rating was provided by both Dr. Sergio Delgado and Dr. Patrick J. Fahey.

3. Claimant described his duties with respondent as "corrosion control." His job was to disassemble heavy military vehicles and apply corrosion-blocking compounds. Because of the back injury, claimant could not return to work for respondent as the job required heavy lifting.

4. In June 1997, claimant found other employment as an assistant manager with Orscheln. Orscheln accommodated claimant's back injury as it did not require him to lift over 40 pounds. At the time of the July 1999 regular hearing, claimant was earning $8.10 per hour, or $324 per week. In that job, claimant does not receive employer-paid fringe benefits.

5. The parties stipulated that claimant's pre-injury average weekly wage was $459.20. Comparing the pre-injury wage to the $324 post-injury wage, claimant has sustained a 29 percent wage loss.

6. The only issue that was argued to the Appeals Board was claimant's task loss. Both vocational rehabilitation expert Monty Longacre and vocational rehabilitation expert Karen

Crist Terrill reviewed claimant's work history for the 15-year period before the date of accident. Mr. Longacre determined that claimant had performed a total of 23 different tasks and Ms. Terrill determined that claimant had performed a total of 34 different tasks.[1]

7. Using Mr. Longacre's task list, both Dr. Delgado and Dr. Fahey indicated that claimant had lost the ability to perform 20 of 23, or 87 percent, of the former work tasks.

Using Ms. Terrill's list, Dr. Fahey indicated that claimant had lost the ability to perform 22 of 34, or 65 percent, of the non-duplicative tasks. Dr. Delgado was deposed before Ms. Terrill compiled her task list and, therefore, he was not asked to review it.

8. The Appeals Board is not persuaded that one vocational rehabilitation expert's opinion of claimant's former work tasks is more accurate than the other's. Therefore, the Appeals Board finds that claimant's task loss lies somewhere between 65 and 87 percent. The Appeals Board averages those percentages and finds that claimant has sustained a 76 percent task loss due to the April 1997 accident.

CONCLUSIONS OF LAW

1. The Award should be modified to increase the permanent partial general disability to 53 percent.

2. Because a back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides, in part:

> . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .

[1] Ms. Terrill's report lists 43 tasks, nine of which she identifies as duplicates. Therefore, the 34 non-duplicative tasks will be used to compute task loss.

But that statute must be read in light of Foulk[2] and Copeland.[3] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

3. Respondent and its insurance carrier do not allege that claimant failed to exert a good faith effort in finding other employment. Therefore, claimant's actual post-injury wage should be used in computing the permanent partial general disability.

4. Averaging the 76 percent task loss with the 29 percent wage loss, the Appeals Board finds that claimant has a 53 percent permanent partial general disability.

5. Respondent and its insurance carrier argue that the Judge ventured outside the evidentiary record to formulate his own task list. The Appeals Board agrees that would be improper. But the Appeals Board also acknowledges that a fact finder must use his or her collective knowledge and experiences in determining disputed facts and the weight evidence should be given. In making the above findings and conclusions, the Appeals Board has conducted a de novo review confining itself to the record.

AWARD

WHEREFORE, the Appeals Board modifies the October 15, 1999 Award and increases the permanent partial general disability to 53 percent.

Kenneth S. Schortmann is granted compensation from UNC Lear Siegler and its insurance carrier for an April 29, 1997 accident and resulting disability. Based upon an average weekly wage of $459.20, Mr. Schortmann is entitled to receive 4.43 weeks of temporary total disability benefits at $306.15 per week, or $1,356.24, followed by 219.95

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[2] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] Copeland, p. 320.

weeks of permanent partial general disability benefits at $306.15 per week, or $67,337.69, for a 53 percent permanent partial general disability, making a total award of $68,693.93.

As of May 10, 2000, there would be due and owing to Mr. Schortmann 4.43 weeks of temporary total disability compensation at $306.15 per week, or $1,356.24, plus 153.71 weeks of permanent partial disability compensation at $306.15 per week, or $47,058.32, for a total due and owing of $48,414.56, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $20,279.37 shall be paid at $306.15 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley E. Oyler, Topeka, KS
Janell Jenkins Foster, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director